

Howard Research and
Development Corporation,

Petitioner

* Before The Zoning Board
* of Howard County
* Zoning Board Case 1095M

* * * * *

DECISION AND ORDER

On March 6, 2012, the Zoning Board of Howard County, Maryland considered the petition of the Howard Research and Development Corporation to amend the existing Preliminary Development Plan for the New Town District of Columbia to:

1. Increase the overall allowable maximum density in the Columbia New Town District by .0052 dwelling units per gross acre, from 2.3643 to 2.3695 dwelling units per gross acre; and
2. Increase the allowable acreage for Apartment Land Uses from 1,707 to 1724 acres; and
3. Decrease the allowable acreage for Employment Center Uses from 2,711 to 2,694 acres; and
4. To change the Land Use designation of approximately 16.60 acres of the 18.68 acre New Town-zoned subject property from Employment Center Land Use to Apartments Land Use except for approximately 2.03 acres adjoining the M-1-zoned property to the east which would remain in the Employment Center Land Use designation.¹

The subject property is located at the southwest corner of the Lark Brown Road intersection with Old Waterloo Road and is identified as Tax Map 37, Grid 20, Parcel 382, Parcel F.

¹ These amendments, filed on March 1, 2012, reflect slight changes from the proposed amendments contained in the original petition submitted to the Department of Planning and Zoning and the Planning Board. The Zoning Board determined that the amendments were not substantial and therefore did not require further evaluation and recommendation by the Planning Board. As provided below, the Department of Planning and Zoning recommended approval of the March 1 amendments and found the amendments to be not substantial.

The notice of the hearing was advertised, the subject property was posted and adjoining property owners were mailed notice of the hearing as required by law as evidenced by the certificates of advertising, posting and mailing of notice to adjoining property owners, all of which was made part of the record. Pursuant to the Zoning Board's Rules of Procedure, all of the reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning and the Planning Board's Recommendation, were made part of the record of the case. Both the Department of Planning and Zoning and the Planning Board recommended approval of the petition, as amended.

The Petitioner was represented by Sang Oh, Esquire. There was no opposition to the petition. Joseph Rutter, Jonathan Mayers and Joseph Cronyn testified for the Petitioner. A supporter, Joan Lancos, also appeared and testified in support of the petition.

After careful evaluation of all the information presented, the Zoning Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The petition in this case involves the Petitioner's proposed amendment to the Preliminary Development Plan ("PDP") for the New Town District of Columbia to increase the overall maximum allowable density in New Town by 0.0052 dwelling units per gross acre. Since the Zoning Board granted an amendment to the New Town PDP in ZB case 1031M to increase the overall maximum density from 2.35 to 2.3643 dwelling units per gross acre, this decision will

address whether or not to grant an additional increase in overall residential density for the PDP from 2.3643 to 2.3695 dwelling units per gross acre.²

This proposed density increase relates to Petitioner's plans with respect to the 18.68 acre subject property referred to as Paragon at Gateway Overlook. The subject property is the undeveloped remainder of the Benson East subdivision, most of which has been improved with the Gateway Overlook Shopping Center, which is located generally west of the subject property.

The Petitioner requests the density increase in order to accommodate the last 74 dwelling units of the 320 apartment dwelling units proposed for development on the subject property. There is excess capacity on the existing PDP to accommodate the first 246 apartment dwelling units proposed as part of the petition.

In order to pursue the proposed development, the Petitioner also requests that the PDP be amended to increase the permitted acreage of the Apartments Land Use designation on the PDP from 1,707 to 1,724 acres and that the PDP be amended to decrease the permitted acreage of the Employment Center Land Use designation on the PDP from 2,711 to 2,694 acres. Finally, the Petitioner also requests that the PDP map be amended to change the Land Use designation for 16.60 acres of the 18.68 acre subject property from Employment Center Land Use to Apartments Center Land Use, with a total of approximately 2.08 acres of land along the border of the M-1-zoned property to the east being retained in the Employment Center Land Use designation, as depicted on the Concept Plan submitted by Petitioner.³

² While the Petition and DPZ's Technical Staff Report refer to the proposed density increase as being from 2.35 dwelling units per acre to 2.3552 dwelling units per gross acre, this would ignore the increase in density granted in ZB Case 1031M from 2.35 to 2.3571 dwelling units per acre, reserved only for 96 age-restricted, moderate income housing units on the Old Exxon site in the Village of Oakland Mills, and from 2.3571 to 2.3643 dwelling units per gross acre reserved only for 100 residential dwelling units in non-Downtown Columbia Villages as provided in ZB 1031M.

³ As proffered by Petitioner, this retention of the Employment Center Land Use designation on the subject

2. The Petitioner presented testimony that the applicable criteria for the Board to apply in deciding this petition to amend the PDP – were those contained in Section 125B.3. – after consideration of the guides and standards listed in Section 125B.3, (1) that the petition complies with the provisions of the Zoning Regulations (Section 125B.3.a) and (2) that the PDP constitutes a general land use plan for the area covered thereby, designed to meet the objectives set forth in the Zoning Regulations (Section 125B.3.c.). The criterion contained in Section 125B.3.b, that a New Town District should be located at the proposed site cannot be applicable to this case since no land was proposed to be rezoned to the NT District in the petition.

3. Mr. Rutter, the former Director of the Department of Planning and Zoning, testified first on behalf of the Petitioner. Mr. Rutter gave a history of the subject property and the surrounding land uses in relation to Howard County's master plans.

Mr. Rutter testified, through a series of Aerial photographs as part of Applicant's Exhibit 1, that as part of the 1990 General Plan, it was the intent that General Electric would be Howard County's major employer on its 1100 acres of properties on what is now the Gateway property to the south of MD 175. When GE abandoned its plans for development in 1998, the property was sold back to Howard Research and Development. During this period, Mr. Rutter testified that there were no retail centers in the area and the entire Gateway Overlook property, including the subject property, was undeveloped but was planned for Employment Center use. The plans for Gateway Overlook property in the 1990 General Plan was as a deferred mixed-use center to develop sometime after 2000.

property's land bordering the M-1-zoned property of Mr. Frank Rhodes, was proposed by amendment of the original petition, in order to lessen the impact of the setback requirements on the M-1-zoned Rhodes property from residential properties, under the proposed PDP amendment, pursuant to the requirements of the Howard County Zoning Regulations.

In the 2000 General Plan there was a significant change and the concept for the Gateway property changed to Employment Center use as did all the properties south of MD 175, consistent with the development of the Gateway Commerce Center/Columbia Gateway.

Although the properties north of MD 175 were classified as New Town Residential on the 2000 General Plan, Gateway Overlook Shopping Center developed according to the Employment Center Land Use designation, beginning in 2009. Snowden Square and Columbia Crossing had also developed their "Big Box" shopping centers in the area.

Mr. Rutter also testified that during these years the MD 108/MD 175 interchange was shown for planned construction on the County's plans but that in all likelihood this interchange would never be built due to development constraints and environmental issues.

4. Based on this background, Mr. Rutter indicated that the question for the Zoning Board was the appropriate land use for the Paragon parcel, one of the few remaining large undeveloped parcels in the County. Mr. Rutter testified that the subject property's current land use designation was for Employment Center Land Use, which would allow offices or Big Box development. He testified that there is no market for Big Box retail currently, that in fact it is "trending down" due to the increase in Internet sales, and that additionally, whatever retail market existed should be directed to Downtown Columbia. He also testified that the subject property's location made no sense for office development due to the poor visibility in comparison to other nearby locations, including the Gateway Commerce Center.

Mr. Rutter also testified that because the MD 108/MD 175 Interchange would likely not be built, it would be preferable to have some residential use on the larger Gateway Overlook parcel in order to reverse some of the traffic during peak hours.

As to age-restricted housing, Mr. Rutter testified that this type of housing would defeat the purpose of providing housing for workers in the nearby employment centers. Therefore, Mr. Rutter concluded that high-end apartment rental housing seemed like the ideal land use for the subject property, so as to create a mixed use center in combination with the Gateway Overlook Shopping Center.

Mr. Rutter testified that Petitioner's goal was to provide "lifestyle living" where infrastructure is already in place to be consistent with smart growth principles, in proximity to other high-medium density areas with good road access. Mr. Rutter indicated that the proposed development would help set the tone for other redevelopment in the area. He also testified that the subject property is located on the existing Gold Route transit stop. He agreed with DPZ that the proposed development is "reasonably logical from a land use pattern" and not contrary to the General Plan.

Mr. Rutter reiterated that this case was not governed by the change-mistake rule and that the decision for the Zoning Board to make is whether apartments are the appropriate land use for the subject property. Mr. Rutter added that the re-designation of the land use for the subject property to Apartments land use would have a de minimus impact on Columbia overall.

Mr. Rutter also testified that the proposed increase in density and the resulting 350 apartment dwelling units on the subject property would be consistent with Policy 4.6 of the 2000 Howard County General Plan and Smart Growth principles. Policy 4.6 states:
"Provide opportunities for creation of small mixed use centers."

5. Mr. Mayers, President of Chesapeake Realty Partners, the entity that would develop the subject property if the PDP amendment was granted, testified as to the planned development details of the subject property. While acknowledging that the Concept Plan that was submitted

with the petition was not binding since this was not a documented site development plan case, Mr. Mayers indicated that the Concept Plan is their plan and it would be developed as shown.

Mr. Mayers testified that the two target markets for the proposed housing were the 24-35 young professionals age group and the 55 and over "empty nesters". The former group worked either in the immediate area or the Baltimore/Washington area and wanted good road access. The latter group was ready to downsize, already lived in the area, and wanted a place to live for all or part of the year.

Mr. Mayers described many of the amenities that would be provided in the proposed development, including a club center, a pool and lounge, a community center, a fitness center, a dog park, a greenhouse, cyber café and conference rooms, lavish lobbies, storage areas and elevators.

In response to concerns raised in the Health Department's comments regarding the possible location of residential buildings too close to the Costco docking area in the Gateway Overlook Shopping Center, Mr. Mayers testified that while noise issues would be addressed later in the development process, he assured the Board that only parking would be located anywhere near Costco and that residential buildings would be located far away from any use producing significant amounts of noise.

6. Mr. Joseph Cronyn, an analyst with Lipman, Frizzell & Mitchell LLC, testified next for the Petitioner on the issue of fiscal impact. He submitted Applicant's Exhibit 2, a Fiscal Impact Analysis, analyzing the fiscal impact of the proposed development on the County.

Mr. Cronyn testified that he assumed two different pupil generation rates that would be generated by the proposed 350 dwelling unit development, one at 100% of the Board of Education's standard generation rate, which produced 49 pupils and, and the other at 80%, which

produced 39 students. Mr. Cronyn noted that the Board of Education's standard pupil generation rate was based on 3 bedroom apartment development, while Petitioner's proposed development would be a mixture of one and two bedroom apartments, so that his analysis was based on a worst case scenario, using very conservative numbers. Using those numbers, Mr. Cronyn concluded that under the 39 student scenario, the development of the subject property as proposed would result in a net positive of \$2.6 million more revenues than costs to the County over 20 years, while the 49 student scenario would produce a net positive of \$353,000 over 20 years. By comparison, Mr. Cronyn acknowledged that a no development scenario of the subject property would result in a net positive of 2.8 million to the County over 20 years.

7. Mr. E. Alexander Adams, Esq., attorney for Mr. Frank Rhodes, Sr., the owner of the adjoining M-1-zoned property to the east of the subject property, testified that based on agreements between Mr. Rhodes and the Petitioner, including the non-substantial amendments noted in this decision, Mr. Rhodes did not oppose the proposed amendments to the PDP. Mr. Adams testified that Mr. Rhodes had an established greenhouse operation on his property, leased to and operated by his son. Mr. Rhodes indicated that he would fence his greenhouse operation which should solve any possible issues between the developments on the two adjoining properties.

8. The criteria for considering decisions on proposed Preliminary Development Plans in the New Town District, including proposed amendments thereto, are as follows in the Howard County Zoning Regulations:

Section 125B.3:

The Zoning Board shall consider the following guides and standards in reviewing the petition: the appropriateness of the location of the NT District as evidenced by the General Plan for Howard County; the effect of such District on properties in the surrounding vicinity; traffic patterns and their relation to the health, safety and general welfare of the County; the physical

layout of the County; the orderly growth of the County; the availability of essential services; the most appropriate use of the land; the need for adequate open spaces for light and air; the preservation of the scenic beauty of the County; the necessity of facilitating the provision of adequate community utilities and facilities such as public transportation, fire-fighting equipment, water, sewerage, schools, parks and other public requirements, population trends throughout the County and surrounding metropolitan areas and more particularly within the area considered; the proximity of large urban centers to the proposed NT District; the road building and road widening plans of the State and County, particularly for the area considered; the needs of the County as a whole and the reasonable needs of the particular area considered; the character of the land within the District and its peculiar suitability for particular uses; and such other matters relevant and pertinent to the relationship of the District to the comprehensive zoning plan of the area.

The petition shall be granted only if the Zoning Board affirmatively finds:

- a. That the petition complies with the provisions of these Regulations; and
- b. That a New Town District should be located at the proposed site; and
- c. That the Preliminary Development Plan constitutes a general land use plan for the area covered thereby, designed to meet the objectives set forth in these Regulations.

A determination that the petition "complies with the provisions of these Regulations" would include consideration of Section 100A of the Zoning Regulations as provided below:

A. Legislative Intent

These zoning regulations and maps are being enacted for the purpose of preserving and promoting the health, safety and welfare of the community. It is the intention of the Zoning Board to guide the future growth and development of the County in accordance with a General Plan which represents the most beneficial and convenient relationships among the residential, non-residential and public areas within the County considering the suitability of each area for such uses, as indicated by existing conditions, trends in population and modes of living, and future requirements; and considering such conditions, trends and requirements, both within the County and in relationship to areas outside thereof. It is further the intent of these regulations:

1. To provide adequate light, air and privacy; to secure safety from fire and other danger, and to prevent over-crowding of the land and undue congestion of population;

2. To protect the character, the social and economic stability of all parts of the County; to guide the orderly growth and development of the County, and to protect and conserve the value of land and structures appropriate to the various land use classes established by the General Plan for Howard County, and by these comprehensive zoning regulations;
3. To promote the most beneficial relationship between the uses of land and structures, and the road system which serves these uses, having particular regard for the potential amount and intensity of such land and structure uses in relationship to the traffic capacity of the road system, so as to avoid congestion in the streets and roadways, and to promote safe and convenient vehicular and pedestrian traffic movements appropriate to the various uses of land and structures throughout the County;
4. To provide a guide for public action in the orderly and efficient provision of public facilities and services, and for private enterprise in undertaking development, investment and other economic activity relating to uses of land and structures throughout the County;
5. To provide for adequate housing choices in a suitable living environment within the economic reach of all citizens;
6. To provide open space that helps preserve natural, environmental, historic, architectural and other landscape resources of the County as well as providing adequate space for recreation;
7. To ensure that all development and land uses protect or enhance the natural, environmental, historic, architectural and other landscape resources of the County, especially highly fragile and environmentally important features such as floodplains, wetlands or steep slopes.
8. To preserve agricultural land.
9. The Board finds that after consideration of the guides and standards in the preamble to Section 125B.3. above and the Legislative Intent provisions of Section 100A, and the applicable criteria of Section 125B.3, that is whether the petition complies with the provisions of the Zoning Regulations and whether the proposed PDP constitutes a general land use plan for the area of the subject property designed to meet the objectives of the Regulations, the Board makes the following findings of fact on these criteria⁴:

a. The Petitioner presented undisputed and substantial evidence, which the Board accepts as convincing, that the proposed amendments to the Preliminary Development Plan described above:

⁴ The Board notes that the criterion of Section 125B.3.b.- "That a New Town District should be located at the proposed site" is applicable only in instances when land is being rezoned to the NT Zoning District, which is not the case in this petition. The subject property is already zoned NT in this case and has been for a number of years. The only applicable criteria in this case is contained in Section 125B.3 a. and c.

1. Will enable the subject property to be developed with 350 apartment dwelling units; and
2. Will allow the adjoining Gateway Overlook Shopping Center and the subject property's apartment development to function as a small mixed use center consistent with Policy 4.6 of the 2000 General Plan;
3. Will result in a development that will utilize infrastructure already in place consistent with smart growth principles, including public transit;
4. Will result in a development that is compatible with the uses in the area and will be preferable in terms of peak hour traffic generation;
5. Will result in development which will have a net positive fiscal impact on the County, although not as positive an impact as no development of the subject property would have on the County over a 20 year period; and
6. Is the most appropriate land use plan for the area of the subject property, more appropriate than maintaining the Employment Center Land Use designation on the subject property, since the property is unlikely to develop with either Big Box retail or offices in the current and foreseeable development market.

10. With respect to the issue of fiscal impact the Board further finds that fiscal impact is only one factor that the Board must balance against other factors in addressing the criteria in Section 125B.3. of the HCZR, and it would not usually be the deciding factor unless significant adverse fiscal impact was clearly established, which is not the case with regard to this petition. Fiscal impact is an important factor to weigh along with others and the Board has made its findings on

the proposed amendments based on its findings that under either the 350 apartment development or no development scenario, the fiscal impact on the County is likely to be positive. Therefore, the Board finds that other factors related to the County's public health, safety and general welfare, as noted above, are more material in deciding this petition according to the applicable criteria for PDP amendment decision-making.

CONCLUSIONS OF LAW

1. It is Petitioner's burden, pursuant to Rule 2.403D.3. of the Board's Rules of Procedure, to establish by a preponderance of the evidence that the proposed amendments to the PDP meet the criteria for approval in Section 125B.3 of the HCZR. If the Board determines that Petitioner has met that burden, the Board may grant the petition.

2. The Board, in order to grant the petition, is required to find that the PDP, with the amendments as proposed, after consideration of all the "guides and standards" in Section 125B.3., will "constitute a general land use plan for the area covered thereby, designed to meet the objectives set forth in these Regulations." The prime objective of the Zoning Regulations in Section 100A is to preserve and promote the health, safety and welfare of the community and "to guide the future growth and development of the County in accordance with the General Plan which represents the most beneficial and convenient relationships among the residential, non-residential and public areas within the County considering the suitability of each area for such uses, as indicated by existing conditions, trends in population and modes of living, and future requirements; and considering such conditions, trends and requirements, both within the County and in relationship to areas outside thereof." Eight more specific objectives are listed under Section 100A of the HCZR, all of which the Board must consider in deciding whether the PDP, as it is proposed to be amended, constitutes a general land use plan for the area covered that

meets these objectives. In addition, the Board must take into consideration the pertinent recommendations of the 2000 Howard County General Plan, particularly Policies and Action 4.6 in deciding this petition. The Board, after taking all of this under consideration, addresses the applicable criteria as indicated below.

3. The Petitioner submitted a fiscal impact analysis in which the development of 350 apartment dwelling units on the subject property was assumed for purposes of analyzing the fiscal impact of this development.

The Board concludes that the fiscal impact analysis is not a decisive basis or determinative factor for the Board's ultimate decision in this matter one way or another for several reasons. The Board concludes that the differences in the fiscal impact on the County of apartment versus no development could be minimal, that under the worst case scenario both scenarios are likely to be fiscally positive for the County, and that non-fiscal impact factors therefore must be examined to decide this petition.

4. The Petitioner has met its burden of convincing the Board, based on the Board's above findings of fact, and pursuant to the applicable decision-making criteria noted above in Conclusions of Law 3, that the proposed PDP amendments constitute a general land use plan for the area covered by the PDP that meets the guides and standards of Section 125B.3 including the legislative intent of Section 100A. of the Howard County Zoning Regulations, and therefore meets the objectives of the New Town Zoning Regulations.


For the foregoing reasons, the Zoning Board of Howard County, Maryland on this 19th day of April, 2012, hereby GRANTS Petitioner's request for the following amendments to the Preliminary Development Plan for the Columbia New Town District:

1. To increase the allowable density in the Columbia New Town District by .0052 dwelling units per gross acre from 2.3643 to 2.3695 dwelling units per gross acre⁵; and
2. To increase the allowable acreage for Apartment Land Uses from 1,707 to 1,724 acres; and
3. To decrease the allowable acreage for Employment Center Land Uses from 2,711 to 2,694 acres; and
4. To change the Land Use designation for 16.6 acres of the 18.68 acre subject property from Employment Center Land Use to Apartments Land Use, retaining 2.08 acres in the Employment Center Land use category along the border of the adjoining M-1-zoned property to the east, as shown on Petitioner's concept plan.

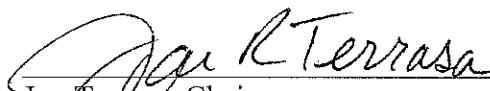
⁵ As noted in Footnote 2 above, the increase in density from 2.35 to 2.3643 dwelling units per gross acre granted in ZB Case 1031M is limited in use to the developments specified in the decision and order in ZB Case 1031M.

ATTEST:

ZONING BOARD OF HOWARD COUNTY



Robin Regner
Administrative Assistant

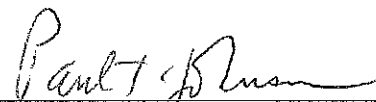


Jen Terrasa, Chairperson


PREPARED BY HOWARD COUNTY
OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR



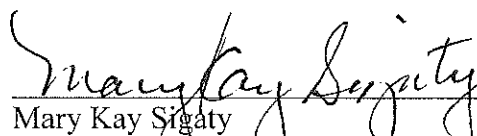
Calvin Ball, Vice Chairperson




Paul T. Johnson
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Greg Fox



Mary Kay Sigaty



Courtney Watson